In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 535

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. After a hearing on the Union's [1] petitions for elections among the debit insurance agents employed in two of petitioner's district offices in western Pennsylvania, the Board found that each office constituted an appropriate bargaining unit (138 N.L.R.B. 538). The Union was certified as bargaining representative following elections in which it received a majority vote

[1] Insurance Workers International Union, AFL-CIO.

of the agents in each office (J.A. 117a-120a).[2] Thereafter, the Company refused to bargain with the Union on the ground that the Board had improperly determined that the individual district offices constituted appropriate units for collective bargaining (J.A. 120a-122a, 103a). In the subsequent unfair labor practice proceeding, the Board rejected the Company's challenge to the prior unit designation and found that the Company's admitted refusal to bargain with the Union violated Sections 8(a)(5) and (1) of the Act (142 N.L.R.B. 28; J.A. 9a-17a, 3a-8a). The court of appeals affirmed *per curiam* (328 F.2d 891 (C.A. 3)). On April 26, 1965, shortly after this Court's decision in *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, the Company's petition for a writ of certiorari was granted, and the judgment of the court of appeals was vacated and the case remanded with instructions to remand it to the Board for further proceedings consistent with the opinion in *Metropolitan* (380 U.S. 522).

Pursuant to the remand, the Board invited the parties to file briefs on the unit issue in the light of this Court's opinion in *Metropolitan* and the Board's supplemental decision on remand in that case (Pet. App. 30, 19).[3] The Board issued a supplemental decision

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[2] "J.A." refers to the Joint Appendix to the briefs in the court below.

[3] In *Metropolitan*, the Court held that the Board's district-office unit determination could not properly be reviewed "due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases * * *." (380 U.S. at 442), and directed that the case be remanded to the Board for fur-

and order, reaffirming its original unit determination and its conclusion that the Company had unlawfully refused to bargain with the Union in the designated units (Pet. App. 30-31, 44). The Board noted that in its supplemental decision in *Metropolitan* it had concluded that "a district office unit is one which the Board will normally find appropriate as the insurance industry's analogue of the single manufacturing plant or the single store of a retail chain" (Pet. App. 31). The Board found that the facts in the present case were similar to those in *Metropolitan* and that there was no reason to depart from the unit standards enunciated in that case (Pet. App. 32-34).

The court of appeals held that the Board had complied with the terms of the remand (Pet. App. 19-20), that the Board was not required to reopen the underlying representation proceeding (Pet. App. 20), and that the Board did not abuse its discretion in certifying the Union to represent petitioner's employees in the two district-office units (Pet. App. 21-24). Accordingly, the court enforced the Board's order directing petitioner, upon request, to bargain with the Union in the designated units (Pet. App. 26-27, 44-48).

2. Petitioner does not challenge the Board's unit determinations on the merits. The only question presented is whether the Board accorded petitioner due

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ther proceedings. The Board subsequently issued a supplemental decision in *Metropolitan*, articulating its reasons for finding a single, district-office unit appropriate (*Metropolitan Life Insurance Co. (Woonsocket, R.I.)*, 156 NLRB 1408 (1966), and the case was thereafter settled by agreement of the parties (Pet. App. 30, n. 6).

process and complied with the terms of this Court's remand by permitting the parties to file briefs on the unit issue in the unfair labor practice proceeding, instead of reopening the original representation proceeding, articulating its unit standards there, and then affording petitioner a second opportunity to refuse to bargain with the Union (Pet. 11-15).

The court below properly observed that this Court's remand in *Metropolitan* did not require the Board to follow any particular procedure, but merely "to provide the courts with a complete presentation of the Board's rationale and supporting evidence in making these unit determinations. Here the Board has made such a presentation" (Pet. App. 19-20). Moreover, petitioner was not prejudiced by the Board's failure to reopen the representation hearing. As the court below added (Pet. App. 20), the "Company presented a most complete and competent case at the original representation hearing, and its position there * * * is precisely that advanced in its briefs to the Board on remand, and again in the appeal to this court."[4]

The procedure followed by the Board, moreover, was fully consistent with the statutory scheme. In the circumstances of this case, "The unit proceeding and [the] complaint on unfair labor practices are

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[4] In the original unfair labor practice proceeding, the Company sought to introduce evidence showing that the Board's unit determinations were coextensive with the Union's "extent of organization." On remand, the Board accepted the Company's offer of proof with respect to this evidence, thereby treating it as though it had been established, but concluded that it did alter the propriety of its unit determinations (Pet. App. 20, 36-38).

really one." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158. In view of the fact that petitioner persisted in its refusal to bargain after the Board had reaffirmed its district-office unit standards in the supplemental decision in *Metropolitan* (note 3, *supra*), petitioner should not be permitted to escape the consequences of its deliberate conduct until after the Board had reopened the representation proceeding and reaffirmed its unit determinations, and the Union had been forced to engage in the futile act of again asking the Company to honor the Board's certification.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

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